UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of

LYNN TILTON;
PATRIARCH PARTNERS, LLC;
PATRIARCH PARTNERS VIII, LLC;
PATRIARCH PARTNERS XIV, LLC;
AND
PATRIARCH PARTNERS XV, LLC,

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO STRIKE AS INADMISSIBLE, IN WHOLE OR IN PART, CERTAIN LAY OPINION TESTIMONY

Introduction

The Division of Enforcement ("Division") respectfully files this opposition to Respondents' Motion *in Limine* to Strike as Inadmissible, In Whole or In Part, Certain Lay Opinion Testimony ("Motion"). The Motion relies on arguments that are both premature and irrelevant. First, as has been explained in its responses to other motions, the Division is not seeking to introduce sworn statements by non-parties and will comply with Rule 235(a) to the extent required. Second, Respondents will have the opportunity to cross-examine the Division's witnesses at the hearing. Finally, the Law Judge, not a jury, is the finder of fact in this matter. Given the broad concept of evidentiary relevance in administrative proceedings, the Law Judge should determine relevance once the evidence has been heard. For these reasons, Respondents' Motion should be denied.

Argument

I. Respondents' Arguments Relating To Foundation Are Premature and Irrelevant.

Rule 320 of the Commission's Rules of Practice governs the admissibility of evidence. *See* 17 C.F.R. § 201.320. When admitting evidence at an administrative hearing before the Commission, the standard of "relevance" is very broad. *Id.* at *2 & nn.5-7. ("The notion of 'relevance' [in Rule 320 of the Commission's Rules of Practice] is much broader than that concept under the Federal Rules of Evidence. ... Our law judges should be inclusive in making evidentiary determinations. ... '[I]f in doubt, let it in.'"); *accord Charles P. Lawrence*, 43 S.E.C. 607, 612-13 (1967) ("[A]ll evidence which 'can conceivably throw any light upon the controversy' should normally be admitted."); *see also In the Matter of Russo Securities, Inc.*, Release No. 42115 (Nov. 9, 1999) ("The notion of 'relevance' embodied in Rule 320 is broader than that concept under the Federal Rules of Evidence. The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications. Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries.").[1] It is well-established that the Federal Rules of Evidence do not apply in administrative proceedings. *In the Matter of City of Anaheim*, Release No. 42140, 1999 WL 1034489 * 2 (November 16, 1999) ("The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications.").

[1] The Commission's recently-adopted amendments to Rule 320 will apply in this proceeding. *See, e.g.*, Amendments to the Commission's Rules of Practice at 76 (noting that amended Rule 320 applies to "all proceedings where hearing has not begun as of the effective date of these amendments"), available at https://www.sec.gov/rules/final/2016/34-78319.pdf. Under amended Rule 320, "unreliable" evidence is added to the list of evidence that "shall be" excluded. *See, e.g.*, *id.* at 60. The Law Judge is in the best position to determine the reliability of the evidence presented.

To begin, Respondents argue that certain of the witnesses from whom the Division took investigative testimony "speculate wildly regarding matters about which they lack any personal knowledge." Memorandum of Law in Support of Respondents' Motion *in Limine* to Strike as Inadmissible, In Whole or In Part, Certain Lay Opinion Testimony ("MOL") at 6. To support this assertion, Respondents quote short portions of testimony transcripts and assert that the questions eliciting the testimony at issue were lacking proper foundation. The Division disagrees not only with the characterization of the testimony quoted by Respondents, but also with the assertion that the questions lacked foundation. However, these objections are both irrelevant and premature.

As made clear in prior filings, at this time the Division is not seeking to introduce sworn statements by non-parties. *See* Div. Opp. Resp. Mot. *in Limine* to Exclude Trans of Inv. Test. (filed Sept. 9, 206) at 2-3; Div. Opp. Resp. Mot. *in Limine* to Exclude Trial Transcripts (filed Sept. 12, 2016) at 2-3; The Division is well-aware that if in the future it seeks to do so, it must comply with Rule 235(a).[2] The Division is not aware of any witnesses that are unavailable for trial, and accordingly, the witnesses upon whose testimony the Division will rely will be called to the stand, questioned by the Division, and available to the Respondents for cross-examination. Whether or not a proper foundation was laid in the investigative record is irrelevant; witnesses will appear in person at the hearing and Respondents will have the opportunity to object and cross-examine the witnesses at that time.

II. Respondents' Arguments Regarding Legal Conclusions Are Similarly Premature and Irrelevant.

Respondents further argue that the testimony transcripts are full of inadmissible legal conclusions. MOL at 9. Again, however, the Division is not seeking to admit those transcripts. Moreover, testimony regarding the investors' understanding of the indentures and the disclosures

[2] The Division does intend to use investigative testimony transcripts of non-party witnesses for any proper purpose, such as to refresh recollection or impeach the witness.

contained therein is not an inadmissible legal conclusion. Rather, such evidence is probative of their understanding of how the funds were being managed. *See* Div. Opp. Mot. *in Limine* to Preclude Test. and Evid. Regarding Subjective State of Mind of Zohar Fund Inv. (Filed Aug. 29, 2016) at 2-6. Finally, again, the Division will be calling live witnesses that the Respondents can cross-examine. The law judge, as the trier of fact, can then determine the weight to give any such testimony.

III. The Division is Not Seeking Admission of Scientific, Technical or Other Specialized Knowledge By a Lay Witness.

Finally, the Respondents argue, based on one testimony question of a witness that the Division has not even named on its witness list, that the Division is seeking to introduce evidence prohibited by FRE 701(c). At the outset, it is not at all clear that the single quoted passage is asking for technical knowledge of the type that an expert would be expected to provide. The question quoted asked specifically for that witnesses' experience. *See, e.g., Ryan Dev. Co. v. Ins. Lumbermens Mut. Ins. Co.*, 711 F.3d 1165, 1170-71 (10th Cir. 2013) (lay witness may testify on business questions based on personal experience). In any event, this argument suffers from the same deficiencies as the others propounded by Respondents. Once again, the Division is not seeking to introduce a non-party sworn statement. Moreover, witnesses relied upon by the Division will be subject to cross-examination by Respondents.

Conclusion

For the foregoing reasons, Respondents' motion should be denied.

Dated: September 13, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO STRIKE AS INADMISSIBLE, IN WHOLE OR IN PART, CERTAIN LAY OPINION TESTIMONY** was served on the following on this 13th day of September, 2016, in the manner indicated below:

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